

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS: 06-0362P; 06-0382P**  
**Gross Retail Sales Tax**  
**For the Years 2003 through 2005**

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**ISSUE**

**I. Ten-Percent Negligence Penalty.**

**Authority:** IC § 6-8.1-10-2.1; IC § 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

Taxpayer requests that the Department exercise its discretion to abate the ten-percent negligence penalty.

**STATEMENT OF FACTS**

The Department conducted an audit review of two local telephone companies. The two telephone companies are wholly owned subsidiaries of a single entity which – for simplicities sake – will be referred to hereafter as “taxpayer.” The audit reports resulted in the assessment of additional gross retail (use) tax and an attendant penalty of ten percent because taxpayer collected sales tax but did not fully remit those amounts to the state. Taxpayer disagreed with the imposition of the negligence penalty and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer's representative explained the basis for its protest. This Letter of Findings results.

**I. Ten-Percent Negligence Penalty.**

**DISCUSSION**

Taxpayer requests that the department exercise its discretion to abate the ten-percent negligence penalty imposed at the time of the original audit.

IC § 6-8.1-10-2.1 requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to “be determined on a case-by-case basis according to the facts and circumstances of each taxpayer.” Id.

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on “reasonable cause and not due to willful neglect.”

Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish “reasonable cause,” the taxpayer must demonstrate that it “exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed . . . .”

Under IC § 6-8.1-5-1(b), “The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.” The assessment – including the negligence penalty – is presumptively valid. Taxpayer has failed to demonstrate that its failure to remit sales tax was attributable “to reasonable cause and not due to willful neglect.”

### **FINDING**

Taxpayer’s protest is respectfully denied.

DK/DP/BK – December 11, 2006.